The University of the State of New York

The State Education Department
State Review Officer
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No. 24-486

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Brain Injury Rights Group, attorneys for petitioner, by Peter G. Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gil Auslander, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request for funding for her son's tuition, transportation, and nursing services at the International Academy for the Brain l (iBrain) for the 2023-24 school year. Respondent (the district) cross-appeals from a portion of the IHO's decision that awarded an independent educational evaluation (IEE) to the parent. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The parties' familiarity with this matter is presumed, and, therefore, the facts and procedural history of this case will not be recited in detail. Briefly, a CSE convened on March 31, 2022 to develop an IEP for the student with an implementation date of June 8, 2022 (Parent Ex. G at pp. 1, 24). The CSE found the student eligible for special education services as a student with multiple disabilities (id. at p. 1).

The CSE next convened on March 15, 2023 to develop an IEP for the student with an implementation date of March 16, 2023 (Dist. Ex. 1 at pp. 1, 30). The CSE similarly found the student to be eligible for special education services as a student with multiple disabilities (id. at p. 1). The March 2023 CSE recommended that the student be placed in a 12:1+(3:1) special class for ELA, math, sciences, and social studies for a total of 20 periods per week and receive related services consisting of two 30-minute sessions per week of individual occupational therapy (OT), three 30-minute sessions per week of individual physical therapy (PT), three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual vision education services, as well as full-time individual school nurse services (id. at pp. 24-25). The CSE further recommended four 40-minute sessions per year of group parent counseling and training (id. at p. 25). In addition, the CSE recommended that the student receive the same program and services for the 12-month portion of the school year and recommended special transportation for the student consisting of 1:1 nursing services, air conditioning, use of a wheelchair, a 5-point safety harness, limited travel time, and a route with fewer students (id. at pp. 26, 29-30).

In July 2023, the student was assessed by staff at iBrain using the Brigance Inventory of Early Development-III (IED-III) and, according to subsequent progress reports an educational plan was developed for the student on July 10, 2023 (Parent Exs. F at pp. 2-5; H at p. 1; I at p. 1; J at p. 1; K at p. 1). The student began attending iBrain during the 2023-24 school year; however, an exact start date is not provided (Parent Exs. M at ¶11; N at ¶7).

On August 7, 2023, the parent entered into an agreement with B & H Health Care, Inc. (B&H) for the provision of "1:1 Private Duty Nursing services during the school day and/or a 1:1 Transportation Nurse" for the 2023-24 school year from July 7, 2023 through June 21, 2024 (Parent Ex. E).

By letter dated March 19, 2024, the parent notified the district of her intention to remove the student from public school for the 2023-24 school year (Parent Ex. B at p. 1). According to the parent, the CSE last met in March 2022 and failed to reconvene a CSE meeting for the 2023-24 school year (id.). The parent notified the district of her intent to place the student at iBrain for the 2023-24 school year and that she would seek public funding for the unilateral placement (id.). The parent also asserted that she disagreed "with the evaluations conducted by [the district] utilized to develop the March 2022 IEP and request[ed] [IEEs] in all areas of the Student's needs including, but not limited to, a neuropsychological, occupational therapy, physical therapy, and speech/language therapy" (id. at p. 2).

On March 20, 2024, the parent entered into an agreement with iBrain for the student's enrollment at iBrain for the 2023-24 school year from July 7, 2023 to June 21, 2024 (Parent Ex. C).

A. Due Process Complaint Notice and Subsequent Events

In a due process complaint notice dated June 25, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) "throughout his entire history with the [district]" (Parent Ex. A at p. 1). After listing numerous alleged procedural and substantive violations, the parent alleged that a CSE did not convene for the 2023-24 school year and that, after the March 2022 CSE meeting, the next CSE meeting was May 30, 2024 (id. at pp. 5-6). With

respect to the 2023-24 school year, the parent further alleged that the district failed to conduct necessary evaluations of the student, failed to provide a school location letter, failed to appropriately classify the student, failed to recommend an appropriate class size, and failed to recommend appropriate related services including the support of a 1:1 paraprofessional for the student (id. at p. 8). As relief, the parent requested, among other things, an order directing payment for the student's tuition at iBrain, payment for the student's privately obtained transportation services, and payment for the student's privately obtained 1:1 nursing services (id. at pp. 9-10).

On June 28, 2024 the parent entered into an agreement with Sisters Travel and Transportation Services, LLC (Sisters Travel) for the provision of transportation services from July 7, 2023 through June 30, 2024 (Parent Ex. D). Although the agreement with Sisters Travel indicates an end date for transportation services of June 30, 2024, the student's enrollment at iBrain for the 2023-24 school year ended on June 21, 2024—prior to the parent entering into the agreement with Sisters Travel for transportation services (compare Parent Ex. D at pp. 1, 8, with Parent Ex. C at p. 1).

B. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) over the course of four dates between July 16, 2024 and August 29, 2024 (Tr. pp. 1-205).[1] In a decision dated September 20, 2024, the IHO found that the district failed to meet its burden of establishing that the student was offered a FAPE for the 2022-23 and 2023-24 school years as the district failed to present witness testimony to explain how the program recommendations contained in the March 2023 IEP were reasonably calculated for the student to receive an educational benefit, further finding that the iBrain director established that the student required 1:1 paraprofessional services and the district failed to make that recommendation in either the March 2022 or March 2023 IEPs (IHO Decision at pp. 7-8). Turning to the parent's placement of the student at iBrain, the IHO found that the parent met her burden in establishing that iBrain was appropriate (id. at pp. 8-9).

The IHO then determined that equitable considerations did not favor the parent, and the IHO elected to deny funding of the student's tuition, the student's private transportation program, and the student's private 1:1 nursing service based on equitable considerations (IHO Decision at pp. 9-12). More specifically, the IHO held the following equitable considerations against the parent: that the parent failed to timely provide the district with notice of her intention to enroll the student in iBrain; that the parent's testimony was not credible regarding the occurrence and timing of CSE meetings and the student's absences during the 2023-24 school year (id. at pp. 9-10). With respect to the student's absences during the 2023-24 school year, the IHO noted the iBrain quarterly progress reports stated that the student's academic and related services goals could not be addressed due to extended absence, hospitalization, and/or engagement with rehabilitation, while the parent testified that the student was merely absent two-to-three days per month because the student became ill during cold weather, and that the parent could not specify a total number of days the student was absent (id. at p. 10). The IHO noted that the confusion regarding the student's

[1] In an interim decision dated July 17, 2024, the IHO declined to consolidate this matter with another due process complaint notice regarding the 2024-25 school year (IHO Interim Decision).

attendance was exacerbated by the testimony of the iBrain deputy director, who testified that iBrain did not differentiate when a student was physically present and when the student had an excused absence, and additionally testified that the student had perfect attendance (id.). The IHO found that the parent's failure to provide credible and accurate information with respect to the student's actual attendance was a significant equitable factor (id.). Based on the above, the IHO denied the parent's request for tuition funding under equitable considerations (id.).

With respect to the parent's request of funding for the student's private transportation services, the IHO similarly found that equitable considerations were not in favor of the parent, and the IHO denied the requested relief (IIHO Decision at pp. 10-11). In addition to the above, the IHO found, with respect to transportation services, the parent never contacted the district to inquire about transportation services to and from iBrain and the parent did not view or sign the contract with Sisters Travel until June 28, 2024, when the 2023-24 school year was essentially over (id. at p. 11). The IHO further found that, when viewing the lack of credible testimony regarding the student's attendance, it was impossible to determine how many times the student was actually transported by Sisters Travel, which was concerning to the IHO, given that the contract required a "substantial payment" regardless of whether the student actually utilized the service (id. at p. 11).

With respect to the parent's request for funding of the student's private 1:1 nursing services, the IHO similarly found that equitable considerations weighed against granting the requested relief (IHO decision at pp. 11-12). In addition to the factors discussed with respect to the denial of tuition funding, the IHO also found that the parent did not request nursing services from the district before entering into a contract with the provider (id. at p. 11). The IHO noted that the contract for nursing services was signed on August 7, 2023, but that the parent did not provide notice to the school of her intention to unilaterally place the student until March 19, 2024 (id.). Similar to the IHO's findings on transportation, the IHO noted that, given the lack of credible evidence regarding the student's attendance, it was impossible to determine how frequently the student utilized the nursing services (id.).

The IHO went on to award relief consisting of directing the district to conduct a new assistive technology evaluation, and a reconvene of the CSE upon its completion (IHO Decision at p. 12). The IHO also found that the student was entitled to the IEEs requested by the parent, namely an independent educational and transition evaluation, as well as an independent neuropsychological evaluation, to be conducted by qualified providers of the parent's choosing, at a reasonable market rate determined by the district's implementation unit (id. at pp. 12-13).

IV. Appeal for State-Level Review

The parent appeals, alleging, among other things, that the IHO erred in denying any relief for the student based on equitable factors. The parent contends that denying relief in full was excessive and an abuse of discretion. With respect to the lack of a 10-day notice, the parent contends that she expressed her concerns during the March 2022 and March 2023 CSE meetings prior to sending the 10-day notice in March 2024 and that the district failed to provide the parent with notices in her native language such as the procedural safeguards notice which should bar any reduction in funding. Turning to the IHO's denial of transportation and nursing services, the parent asserts that the IHO erred in "ma[king] a distinction between attendance and 'actual attendance.'" According to the parent, the IHO's finding was irrelevant because the student had a hybrid model

of programming, including remote work, and had "'perfect attendance'" because of this. The parent requests direct payment of the costs of the student's tuition at iBrain along with transportation and nursing services pursuant to contracts entered into the hearing record.

The district submits an answer and cross-appeal. In responding to the request for review, the district contends that the IHO correctly concluded that the equities did not favor the parent, and that the IHO correctly denied relief. More specifically, the district contends that the IHO had discretion to reduce the requested relief, that the parent failed to provide 10-day notice of her unilateral placement, that the IHO's findings on credibility are to be afforded deference, and that the IHO correctly found the lack of credible evidence regarding the student's attendance to be a significant factor weighing against relief. The district notes that the IHO correctly pointed out the late signature of the transportation contract and contends that the contracts for both transportation and nursing services were concerning in that they required payment regardless of whether the services were used, a problem exacerbated by the attendance concerns. The district further argues that the parent mischaracterized the IHO's decision as making a distinction between in person and remote sessions, and asserts that the parent failed to explain how nursing and transportation services might have been used when the student was not physically present at iBrain.

The district cross-appeals from the IHO's awarding the parent a publicly funded IEE. The district contends that the parent's March 2024 notice to the district, which included her expressed concerns regarding the March 2022 IEP, had concerns related to the 2022-23 school year, not the 2023-24 school year. The district contends that the parent's disagreement was untimely, as the evaluation used to develop the March 2022 IEP occurred between January and March 2021, which was over three years old at the time of the request so that a reevaluation should have been conducted at that point, making the request irrelevant.

In a reply and answer to the cross-appeal, the parent contends that the IHO properly awarded IEEs to the student at public expense. As part of a reply, the parent further expands on the arguments made in her request for review as to equitable considerations.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would

in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR

300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[2]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matters

Initially, neither party has appealed from the IHO's determinations that the district failed to offer the student a FAPE for the 2022-23 and 2023-24 school years and that iBrain was an appropriate unilateral placement for the student for the 2023-24 school year. Accordingly, these findings have become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The only issues presented on appeal relate to whether the IHO erred in denying the costs of the student's tuition at iBrain, as well as transportation and nursing expenses, for the 2023-24 school year based on equitable considerations and whether the IHO erred in awarding the parent an IEE at district expense.

B. Equitable Considerations:

A reimbursement award requires that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226

[2] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Applicable to all requested relief, the IHO indicated that funding was denied, in part, because the parent failed to provide the district with a timely notice of her intention to unilaterally place the student at iBrain for the 2023-24 school year.

It undisputed that the student began attending iBrain, at some point, during the 2023-24 school year (see Parent Exs. M at ¶11; N. at ¶7).[3] However, it is also undisputed that the parent

[3] The parent and the iBrain director both testified that the student "has attended iBRAIN since the 2023-2024 school year"; however, neither provided an exact date as to when the student began attending iBrain (Parent Exs. M at ¶11; N. at ¶7). The iBrain director testified that he did not recall the specific date when the student began attending iBrain and asked, but was denied, to refresh his memory by reviewing the iBrain education plan (Tr. pp. 58-59). Review of the iBrain education plan included in the hearing record shows that it does not identify the specific date the student began attending iBrain; however, at least one chart tracking the student's performance on a PT goal includes a data point as early as July 10, 2023 (Parent Ex. F at pp. 28, 29; see Parent Ex. F).

did not provide formal notice of the removal of the student from public school and unilateral placement of the student at iBrain until March 19, 2024 (see Parent Ex. B).

The parent contends that the IHO overlooked the fact that the parent expressed concerns with the district's recommendations during both the March 2022 and March 2023 CSE meetings. Review of the March 2022 IEP shows that the parent participated in the CSE meeting, provided input regarding the student, and did express concern that the student required "more sensory stimulation/input" and that she would like to see the student "engage more" (Parent Ex. G at pp. 4, 24). The parent also participated in the March 2023 CSE meeting, and the March 2023 IEP indicates that the parent raised the same concerns (Parent Ex. 1 at pp. 4, 24). Review of the March 2022 IEP and the March 2023 IEP does not indicate that the parent notified the district that she was rejecting the proposed placement, raised concerns regarding the district's proposed program recommendations, or that she intended to enroll the student in a nonpublic school at public expense. Accordingly, the parent's concerns raised during the CSE meetings do not qualify as sufficient notice to the district and the IHO did not err by not considering them in his equitable considerations analysis.

Additionally, I am not persuaded by the parent's arguments, now raised with specificity for the first time on appeal, that the district did not provide proper notice in the parent's native language such that the parent's failure to provide the district with a 10-day notice should not weigh in reducing the relief requested based on equitable considerations. Initially, as the district notes, this was not a contention that was raised in the proceedings below with any specificity, and, as such, I do not find it error for the IHO to have not addressed it below. Further, addressing the parent's contentions, the hearing record does not support a finding that any failure on the part of the district to provide a prior written notice or a procedural safeguards notice in the parent's native language should weigh as an equitable factor in this instance.

The IDEA provides that an award of reimbursement may not be reduced or denied if the parent did not receive a procedural safeguards notice, but does not include similar reference to a prior written notice (20 U.S.C. § 1412[a][10][C][iv][I][bb]; 34 CFR 300.148[e][1][ii]; see 20 U.S.C. § 1415; 34 CFR 300.504). In this instance, the hearing record includes a copy of a March 2023 prior written notice, which indicates that a copy of the procedural safeguards notice could be downloaded through the district's website and provides the name and contact information for a district employee who could provide the parent with a copy (Dist. Ex. 2 at p. 2). In contrast, the parent did not testify that she never received a procedural safeguards notice from the district (see Tr. pp. 144-74; Parent Ex. N).

The parent testified that the reason she did not send the district a notice that she was unilaterally placing the student at IBrain and intended to seek public funding, until March 2024, was because she "might have spoken to the District before that and explained to them that [she] did not agree with [the student] going to a public school" adding that she received a call from the district but it was "complicated to speak to that person because they did not have an interpreter" (Tr. p. 169). She added that the person she spoke with was "bilingual, but he didn't understand

Nevertheless, the student's individualized health care plan is dated September 11, 2023 and the hearing record is not clear as to the exact program the student attended during July and August 2023 (Parent Ex. F at pp. 34-43; see Parent Ex. F).

much" (Tr. p. 170). Accordingly, it does not appear that the parent was not provided with the procedural safeguards notice, nor does it appear that the failure to provide one had any effect on her reason for not sending a notice of her removal of the student from public school until March 2024.

The remainder of the parent's arguments relate to asserting that the IHO's complete denial of relief, rather than a reduction, was excessive and that the IHO erred in relying on the lack of credibility on the part of the parent, regarding her testimony as to the student's attendance.

Overall, while the parent's failure to provide a ten-day notice until March 2024 alone may not have warranted a complete denial of relief, the denial of relief is not unreasonable when this factor is considered in conjunction with several other equitable considerations discussed by the IHO in his decision. In particular, the IHO made credibility findings regarding the parent and iBrain director's testimony concerning the student's attendance during the 2023-24 school year (IHO Decision at pp. 9-12). The IHO specifically noted that the parent's failure "to provide credible and accurate information with respect to the Student's actual attendance at [iBrain] during the 2023-[]24 school year [wa]s a significant equitable factor weighing against the Parent's tuition funding claim" (id. at p. 10).[4]

A party's conduct during a due process proceeding may be weighed as a factor when fashioning equitable relief. If a party has engaged in a pattern or practice that results in unfair manipulation of the due process procedures, there is nothing that precludes an IHO from considering such facts when weighing equitable factors at the conclusion of the impartial hearing, so long as they are based on an adequate record and after providing the parties a reasonable opportunity to be heard (see Application of a Student with a Disability, Appeal No. 24-333).

In this instance, with respect to the CSE meetings, the parent testified that a CSE did not meet from March 2022 until May 2024 (see Parent Ex. N at ¶10). However, as the IHO noted, the hearing record includes a copy of a March 2023 IEP, which indicates that the parent participated via telephone in a CSE meeting in March 2023 (IHO Decision at p. 10; see Dist. Ex. 1).[5] When asked about the March 2023 CSE meeting, the parent testified that she could not recall such a meeting (Tr. pp. 119-20). The IHO found the parent's testimony to be "false" and held it against her as an equitable factor (IHO Decision at p. 10).

The IHO made an additional credibility determination regarding the parent's testimony on the student's attendance during the 2023-24 school year (IHO Decision at p. 10). The IHO noted

[4] With respect to the IHO's findings on credibility, I note that generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]).

[5] While the IHO found that the March 2023 CSE meeting included participants from iBrain (IHO Decision at p, 10), as of the date of the March 2023 CSE meeting, the student had not yet begun attending iBrain (see Parent Ex. N at ¶7).

that the parent's testimony that the student was absent two to three times per month was contradicted by iBrain progress reports which indicated the student had extended absences and hospital stays during the 2023-24 school year (id.). Further finding that iBrain exacerbated the issue by not differentiating between when the student was physically present or had an "'excused' absence," noting that the iBrain director testified the student had "perfect attendance" (id.). The IHO further considered the impact of these discrepancies as they related to the parent's requests for funding of transportation and nursing services whether the student utilized the services or not (id. at pp. 10-12).

Turning to the information available in the hearing record on this issue, the parent testified that the student was absent for approximately two-to-three days per month due to cold weather, without specifying a total number of days that the student was absent (Tr. pp. 164-169). Adding to the confusion, the deputy director testified that the student had "perfect attendance" because the student had no "unexcused absences" (Tr. p. 79). He then explained that he could not identify how many "excused absences" the student had at iBrain, as iBrain "did not differentiate between present and excused absence" (Tr. p. 80). However, when asked if a student who was excused from school due to illness would be counted as being present, the director indicated such an occurrence would be counted "as an excused absence," but when asked again how many excused absences the student had, the director responded "we do not differentiate between an excused absence and a student's being present" (Tr. pp. 80-81). Accordingly, it appears, from the director's testimony, that iBrain has no way of identifying whether a student is actually present in school on any given day or not.[6]

The parent asserts on appeal that the IHO erred in making a distinction between in person attendance and remote sessions. To support her assertion, the parent indicates that the iBrain director testified that iBrain did "not differentiate between in-person and remote sessions" (Req. for Rev. at ¶33). This entire argument appears to be an attempt to recast the director's testimony as something that it was not. As noted above, the iBrain director testified that iBrain "did not differentiate between present and excused absence" (Tr. p. 79). The iBrain director did not reference remote instruction during his testimony (see Parent Ex. M; Tr. pp. 51-114).[7]

As noted by the IHO, the lack of credible information regarding the student's attendance during the 2023-24 school year is troubling. It becomes even more concerning when compared to the documentary evidence in the record, specifically two progress reports from iBrain dated April 12, 2024 and July 5, 2024, respectively (see Parent Exs. J, K). Both progress reports note, repeatedly and consistently, that the student could not make progress in his academic and related service goals due extended absences, hospital stays, and rehabilitation efforts (see id.). However,

[6] Although not addressed by the parties, iBrain's stated attendance policy appears to be in contravention of State regulation as a "record of each pupil's presence, absence, tardiness and early departure shall be kept by each public and nonpublic elementary, middle or secondary school in a register of attendance" (8 NYCRR 104.1[c]). Additionally, "any absence for a school day or portion thereof shall be recorded as excused or unexcused" (8 NYCRR 104.1[d][7][iii]).

[7] The parent, during redirect, mentioned that the student received "most of his therapies" remotely while absent from school (see Tr. pp. 173-174). However, it is unclear the extent to which the student may have received any educational services as part of a remote or hybrid program during the 2023-24 school year. Pertinently, the student's iBrain education plan dated January 5, 2024 does not mention any hybrid model of instruction or remote work for the student (see generally Parent Ex. F).

the extent to which the student was absent from school is impossible to determine based on the hearing record, and, further, the iBrain director testified that iBrain does not maintain records as to student absences as "excused absences" are treated as the student being "present."

In addressing equitable considerations, the IHO addressed the parent's requests for funding of transportation and nursing services separately, weighing the same and some additional equitable factors against the parent in denying funding (see IHO Decision at pp. 10-12). While I do not agree with all of the factors noted by the IHO as to equitable considerations, of particular relevance to the IHO's findings regarding the lack of credible information as to the student's attendance, the IHO also noted that while the transportation contract had a term from July 7, 2023 until June 30, 2024 for the 2023-24 school year, the contract was not signed by the parent until June 28, 2024, after the school year was over (IHO Decision at pp. 10-11; see Dist. Ex. D).[8] As further noted by the IHO, the transportation contract also required payment for services whether they were used or not (id.). Accordingly, given that the hearing record is unclear as to how often the student actually used this service, the parent entering into a contract after the school year had ended in which she agreed to pay for services that were not used weighs heavily against granting the requested relief.

As a whole, in light of the progress reports noting that the student had such extensive absences, so much so that he was not able to make progress on most, if not all, of his academic and related service goals, and further considering how the lack of credible evidence of the student's attendance masks the extent to which services, such as the transportation services contracted for after the end of iBrain's school year, were actually used, the IHO had sufficient reason for finding that the lack of credible evidence as to the student's attendance at iBrain was a significant factor on equitable considerations.

Finally, while any single factor, on its own, may not have warranted the significant result of denying all funding for the student's attendance at iBrain along with the contracted for costs of the student's transportation and nursing services, I find that, when all of the factors discussed above are viewed in conjunction with one another, the IHO appropriately found that equitable considerations weighed against awarding the requested relief.

C. Independent Educational Evaluations

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of

[8] The parent's contract with iBrain for the 2023-24 school year was for a period from July 7, 2023 through June 21, 2024 (Parent Ex. C at p. 1).

Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).[9]

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

Here, the majority of the district's arguments on appeal essentially amount to contentions that the parent's disagreement was aimed toward the wrong school year (2022-23 as opposed to 2023-24), that the disagreement was untimely because the evaluations the parent disagreed with were over three years old at the time the request made, and that the district would be preparing for a new CSE meeting as the student was due for a new reevaluations.

However, as the district implicitly concedes in its own arguments, there is no evidence in the hearing record that new evaluations had occurred prior to the parent's stated disagreement with the district's evaluation of the student. The hearing record shows that, in a letter dated March 19, 2024, the parent expressed disagreement with the evaluations conducted by the district to develop the March 2022 IEP and requested an IEE (Parent Ex. B at p. 2). In reviewing the available documentary evidence, such as the prior written notice dated March 29, 2023, there is no indication that a reevaluation occurred (Dist. Ex. 2 at p. 2). Similarly, the evaluation results section of the March 2023 IEP does not indicate any that a reevaluation was conducted (Dist. Ex. 1 at p. 1).

The Second Circuit has held that parents may base a request for an IEE on the last full evaluation conducted by the district (D.S., 975 F.3d at 169-70 ["Because the only evaluations that trigger a parent's right to an IEE at public expense are the initial evaluation and triennial reevaluations discussed in Section 1414 of the Act, a parent's right to an IEE at public expense ripens each time a new evaluation is conducted. The time within which a parent must express their disagreement with an evaluation and request an IEE depends on how frequently the child is evaluated."]). Thus, although the student might be due for a reevaluation, the last evaluation of the student appears to have been conducted prior to the March 2022 IEP. Accordingly, the parent's

[9] Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

March 19, 2024 disagreement is not "untimely" as the district contends, nor does it matter whether the parent attempted to frame the disagreement as being under the 2022-23 school year, or under the 2023-24 school year. Accordingly, the district has not presented a basis for finding that the IHO erred in granting the parent's request for an IEE.

VII. Conclusion

I have considered the parties' remaining contentions and find the necessary inquiry at an end.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 13, 2025

STEVEN KROLAK
STATE REVIEW OFFICER